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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 208

JOHN HENRY MOORE,
Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF
ST. LOUIS, a Corporation,
Respondent.

## PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Missouri.

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**To the Supreme Court of Missouri.**

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Comes now John Henry Moore, petitioner, and respectfully petitions this Honorable Court to grant a writ of certiorari to the Supreme Court of the State of Missouri, and to remove therefrom to this Court, for review, the

record in the case lately pending in said Supreme Court of the State of Missouri, styled John Henry Moore, Plaintiff-Respondent, vs. Terminal Railroad Association of St. Louis, a Corporation, Defendant-Appellant, being cause No. 46,366 on the docket of said Supreme Court of the State of Missouri.

The duly certified record, including all of the proceedings in the Circuit Court of the City of St. Louis, State of Missouri, wherein said cause was instituted and tried, and in the Supreme Court of the State of Missouri, to which an appeal was taken by said Terminal Railroad Association of St. Louis from the judgment of the trial court, is filed herewith under separate cover.

## OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of Missouri is reported at 312 S. W. 2d 769, and is not otherwise reported. It appears at pages 357-367, incl., of the record herewith filed, and is set out as Appendix A to this petition.

## JURISDICTION OF THIS COURT.

(i)

Jurisdiction of this Court is based upon the Act of Congress of June 25, 1948, c. 646, 62 Stat. 929, Title 28, U. S. Code, § 1257 (3), providing that this Court may, by writ of certiorari, review any final judgment or decree rendered by the highest court of a state in which a decision could be had, where any right, title or immunity is specially set up or claimed under a statute of the United States.

The Supreme Court of the State of Missouri is the highest court of that State.

The action here sought to be reviewed having been based upon the Federal Employers' Liability Act (Act of Apr. 22, 1908, c. 149, 35 Stat. 65, as amended; Title 45, U. S. Code, §§ 51-60), the rights here asserted are Federal rights (*Brown v. Western Railway of Alabama*, 338 U. S. 294, 296, 70 S. Ct. 105, 94 L. ed. 100, 102; *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 352, 63 S. Ct. 1062, 87 L. ed. 1444, 1447). The jurisdiction of this Court attaches because the Supreme Court of the State of Missouri, in reversing the judgment of the trial court upon the grounds that the evidence "does not show negligence" on the part of respondent (R. 366), and that petitioner's injury was a result of his own "inadvertance" (R. 364) in "turning his flat wagon too sharply" (R. 365), has decided a Federal question of substance not in accord with the applicable and controlling decisions of this Court.

(ii)

The judgment of the Supreme Court of the State of Missouri sought to be reviewed appears at page 356 of the record filed herewith, and it was originally entered on April 14, 1958. Said judgment is set out as Appendix B hereto.

Petitioner's motion for a rehearing, or in the alternative to transfer to the court en banc, was filed in the Court below on April 26, 1958, within the time provided by the rules of said Supreme Court of the State of Missouri, and was overruled on May 12, 1958 (R. 380). Said motion appears at pages 369-379, incl., of the record filed herewith, and is set out as Appendix C hereto.

The judgment of outright reversal so entered by the Supreme Court of the State of Missouri is a final judgment under the practice in that state. *State ex rel. McGrew Coal Co. v. Ragland*, 339 Mo. 452, 97 S. W. 2d 113.

## QUESTIONS PRESENTED FOR REVIEW.

It being admitted by the pleadings (R. 2, 7) that petitioner, at the time of his injury, was engaged in his work as an employee of respondent in the furtherance of respondent's business of interstate commerce transportation by railroad, and that both petitioner and respondent were subject to the Federal Employers' Liability Act (45 U. S. Code, §§ 51-60), the questions presented for review are:

1. Whether the Supreme Court of the State of Missouri erred in holding as a matter of law that the evidence adduced does not show any negligence of respondent, and does not permit the inference, or authorize the jury to infer, that the respondent was negligent as charged and submitted.

2. Whether the Supreme Court of the State of Missouri erred in holding that a plat of the scene of plaintiff's injury, drawn to scale and offered in evidence by plaintiff, and some "cut-outs" of vehicles, also made to scale, placed on said plat by plaintiff during the course of his testimony to illustrate their approximate position at the time of his injury, are conclusive and exclusive in determining whether respondent was shown to have been negligent, or whether petitioner is entitled to the benefit of supplementary evidence in the determination of that issue.

3. Whether the petitioner was entitled to have his case submitted to a jury under evidence showing that his place of work, and respondent's appliances and method of work, were unsafe and dangerous in that: (a) respondent's platform, upon which plaintiff was required to work, was narrower than the length of the vehicle, a so-called "flat wagon," which petitioner was required to move over, along and about upon said platform; (b) said platform was obstructed by posts along its center line which supported its

roof; (c) railroad trains moved immediately along the sides of said platform, and, when trains were present there, their overhang further narrowed the usable width of the platform; (d) said platform was, at the time of plaintiff's injury, crowded with vehicles, both moving and standing stationary thereon; (e) petitioner was required in his duties for respondent to move his said flat wagon over and along said platform, obstructed and crowded as aforesaid, while a train was moving alongside said platform; (f) respondent did not provide petitioner with a clear path or other means for the required movement of his said flat wagon without danger of its being brought into contact with the moving train.

4. Whether the Supreme Court of the State of Missouri erred in narrowing the concept of "negligence" under the Federal Employers' Liability Act and has usurped the function of the jury in holding that the evidence failed to show negligence on the part of respondent.

5. Whether the Supreme Court of the State of Missouri has narrowed the concept of "proximate cause" under the Federal Employers' Liability Act and has usurped the function of the jury in holding as a matter of law that petitioner's injury resulted solely from his own conduct and did not result "in whole or in part" from the negligence of respondent.

## THE STATUTES INVOLVED.

The statutes involved are:

Title 28, U. S. Code, § 1257 (Appendix D).

Title 45, U. S. Code, § 51 (Appendix E).

Title 45, U. S. Code, § 53 (Appendix F).

Title 45, U. S. Code, § 54 (Appendix G).

## STATEMENT OF THE CASE.

The petitioner, admittedly at the time of his injury a mail and baggage handler in the employ of respondent and engaged in the furtherance of the latter's business of interstate commerce transportation by railroad (R. 2, 7), brought this suit against respondent to recover damages for injuries sustained at respondent's Union Station in St. Louis, Missouri, on September 18, 1955, when a vehicle, known commonly as a "flat wagon", being moved by plaintiff over and along a concrete platform there, was struck by a train, moving on respondent's track No. 5 immediately adjacent to said platform, the train striking one end of the vehicle and causing it to crush plaintiff between the other end of the vehicle and a car of another train standing on respondent's track No. 4 immediately adjacent to the opposite side of said platform (R. 3, 7).

The concrete platform in question was 14 feet 1⅜ inches wide (R. 42-43, 48), ran in a general northerly and southerly direction (R. 42), and down its center, at intervals of 30 feet, there were iron posts 14 inches in diameter supporting a roof above it (R. 43, 46-47, 48). Immediately adjacent to the sides of the platform were respondent's railroad tracks, track No. 4 being to the west of the platform, and track No. 5 being to the east of the platform (R. 42). A railroad car on these tracks would slightly overhang the edges of the platform (R. 236, 246). The entire platform was some 1800 feet long (R. 308-309). Some 600 to 700 feet south of the north end of the platform were two elevators, known as the "north elevator" and the "south elevator" (R. 309), with there being a distance about the width of an ordinary street between them (R. 46), which elevators moved from the level of the platform down to the sub-basement below it (R. 31-32, 39-41). These elevators were situated in the west half of the plat-

form (R. 106; Plaintiff's Exhibit 8, R. 359). The platform, generally but without a showing of the elevators, can be visualized by looking at Defendant's Exhibit A (R. 361), which is a view toward the south (R. 104).

Plaintiff's work consisted chiefly in loading and unloading baggage cars in said Union Station. On the occasion of his injury, he had been directed to take a "flat wagon" from the sub-basement to the platform to meet Cotton Belt train No. 8, which was due to arrive in the Station, and unload baggage from a car of that train (R. 32). The "flat wagon" was a form of hand truck, 14 feet 8 inches long (R. 52)—longer than the width of the platform—3 feet 8 inches wide overall (R. 52), with a bed 30 inches wide (R. 52), weighing 735 pounds (R. 36), and having hand holds or handle bars on either end by means of which it was pulled to be moved (R. 33, 35). Such a wagon has four wheels—a large wheel of a diameter of 26 inches on either side at the center of the length, and a small wheel of a diameter of 9 inches underneath the center of the bed near either end (R. 36-37). When one end of a flat wagon is moved to make a turn, the wagon pivots on its center wheels and the other end of the wagon moves in the opposite direction (R. 38). A flat wagon is well illustrated in the center of the photograph introduced as Defendant's Exhibit A (R. 361).

On this occasion, petitioner brought a flat wagon up on the south elevator to the platform level from the sub-basement (R. 39-41), moved it off the elevator to the east half of the platform in order to pass around the north elevator (R. 43, 46, 49) and started pulling it behind him northwardly along the east side of the platform adjacent to respondent's track No. 5, to reach the position where he would put it to remove baggage from the Cotton Belt train onto it (R. 40, 41-42, 46, 49). About the time he passed the north elevator, he first noticed the Cotton Belt

train backing in northwardly, with its leading car then about opposite him (R. 47, 48, 49), and he then also observed that there was a Pennsylvania train standing on respondent's track No. 4 on the west side of the platform (R. 49-50), and that there were several other wagons on the platform—flat wagons and so-called "bull wagons" (R. 50-51).

A "bull wagon" is a rectangular truck, 10 feet 3 inches long, 3 feet 7¼ inches wide, with four wheels of equal diameter, and having a tongue by which it is pulled (R. 52-53). Several such wagons are shown on a platform at the left side of the photograph introduced as Defendant's Exhibit A (R. 361).

There were 2 bull wagons observed by petitioner, which were standing, with a tractor attached to them on the north, on the east side of the platform adjacent to the third post north of the north elevator (R. 62), and they did not leave sufficient room for either a flat wagon or a bull wagon to go past them on the east half of the platform (R. 50, 51, 53, 62, 239). These bull wagons and tractor had been placed there by other of respondent's employees, about where a baggage car of the Cotton Belt train would stop, for the purpose of removing cream from the train (R. 220, 238, 239). Petitioner observed several flat wagons on the platform other than the one he was pulling, 3 or 4 of them being moved on the west side of the platform between him and the bull wagons (R. 51), 2 of them on the west side of the platform opposite the bull wagons, and an undetermined number of them north of the bull wagons (R. 53-54). Petitioner's duty required him to take the flat wagon he was pulling to a point on the east half of the platform about 60 feet north of the bull wagons, where the car of the Cotton Belt train from which he was to remove baggage was expected to stop (R. 68-70).

Petitioner continued pulling his flat wagon northwardly on the east side of the platform, and, as he passed the second post north of the north elevator, he kept his wagon as close to the east side of that post as he could get (R. 58-59). He continued northwardly until he was midway between the second and third post, and then he undertook to turn his flat wagon to go to the west side of the platform (to his left), so as to pass around the standing bull wagons and their attached tractor (R. 61-62, 68-69). At that time, 3 cars of the Cotton Belt train had passed petitioner, there were 2 flat wagons moving northwardly, one behind the other, on the west side of the platform opposite and south of the standing bull wagons (R. 68, 96), and there was another flat wagon moving north on the west side of the platform a short distance behind petitioner (R. 59, 71). It was petitioner's intention to "get over there in the clear and get in line with those other two [flat] wagons" (R. 106), because he had to get past the bull wagons and also "didn't feel very safe with that Cotton Belt train running along there beside me, and I wanted to get away from it" (R. 61, 92). If those 2 flat wagons had not been moving petitioner could not have made the turn because there would not have been any place to go (R. 93), and, if those 2 flat wagons had not been there, petitioner would have had "plenty of room" (R. 109), and he "could have made that turn easy" (R. 128). Petitioner further testified, "I did think I was turning safely" (R. 128), but, in the turning of his truck, the rear or south end of it came into contact with the moving Cotton Belt train, the flat wagon was shoved violently in a northwesterly direction pushing petitioner ahead of it, and crushing petitioner between it and the side of a car of the Pennsylvania train standing on track No. 4 (R. 62-65).

There was evidence that there were as many as 7 flat wagons in the area between the north elevator and the standing bull wagons at the time of petitioner's injury (R.

137, 270, 299). There was direct evidence that "the platform was crowded" with vehicles (R. 116, 171, 330) at that time and place, all being handled and moved by respondent's employees (R. 144-147), and petitioner's evidence was that this crowding of the platform made it difficult, if not impossible, for petitioner to turn his flat wagon and "keep it in the clear" (R. 116, 171, 330).

During petitioner's testimony, a plat of a portion of the concrete platform, drawn to scale, and small paper "cut-outs" representing so-called "bird's-eye views" of railroad cars, flat wagons and bull wagons, cut to the same scale as the plat, were used by petitioner to demonstrate the approximate relative positions of the various vehicles on the platform on the occasion of his injury (R. 44-48, 51-57, 62-63). This plat, and some of the cut-outs, are photographically reproduced in the opinion of the Supreme Court of Missouri (R. 359).

Concededly, at the time of petitioner's injury, there was in force respondent's Rule 194, which provided (R. 2-3, 7, 84-85):

> "The congestion of loaded and empty trucks on platforms interferes with passengers as well as with proper handling of traffic, and should be avoided."

At the close of all the evidence, respondent unsuccessfully moved for a directed verdict upon the grounds, inter alia, that the evidence failed to establish negligence on its part, and that the sole cause of petitioner's injury was his own negligence (R. 337).

The petitioner's theory of negligence, submitted by the instructions to the jury (Instruction No. 1, R. 338-340; see, also, R. 358), was:

> " * * * and if you further find that at the time of said occurrence and injury to plaintiff, said platform

was so overcrowded and congested with tractors, bull wagons, flat wagons and similar vehicles, used by defendant for the hauling of mail, express and baggage, if you so find, and that said platform and its parts and appliances, and said flat wagon being pulled by plaintiff, were such, by reason of their size, type of constructions and arrangement, if you so find, as to make it likely that said flat wagon being pulled by plaintiff along said platform would be struck by trains or cars moving over and along the tracks adjacent to said platform; and if you further find that defendant required plaintiff to work, and pull the said flat wagon being pulled by him, on said platform under the circumstances aforesaid (if you find them to be the circumstances), and that in so doing, if you so find, defendant failed to exercise ordinary care and was guilty of negligence; and if you further find that the aforesaid occurrence and injury to plaintiff directly resulted, in whole or in part, from the aforesaid negligence of defendant (if you find defendant was negligent as aforesaid), then your verdict herein must be in favor of the plaintiff, * * *."

The jury was also carefully instructed, by Instruction No. 4 (R. 340-341), that if petitioner's injury resulted solely from his own acts and conduct, and not from negligence of respondent as submitted in Instruction No. 1, the verdict should be for respondent.

The jury was further instructed, by Instruction No. 5 (R. 341-342) and Instruction No. 7 (R. 343-344), that if petitioner's injury resulted from the combined and concurring negligence of petitioner and respondent, petitioner's total damages should be reduced in the proportion which his negligence bore to the combined negligence of the parties.

Under these instructions, the jury returned a verdict (R. 349) in favor of the petitioner in the sum of Ten Thousand Dollars ($10,000.00), and the trial court entered judgment in accordance therewith (R. 349-350).

Thereafter, the respondent appealed to the Supreme Court of the State of Missouri, which court reversed outright the judgment of the trial court (R. 356), holding that the evidence failed to show negligence on the part of respondent (R. 366), and that petitioner's injury resulted solely from petitioner's "inadvertence" in turning the flat wagon too sharply (R. 364, 365). In so holding, the Missouri court apparently considered the showing by the scaled plat and "cut-outs," and that court's interpretation of what they demonstrated, as conclusive and exclusive (cf. R. 364, 365).

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The state court, by its decision and judgment in this cause, denied petitioner a right specially set up and claimed by him under the Federal Employers' Liability Act (45 U. S. Code, §§ 51-60), namely, the right to have his case submitted to a jury for the determination of whether his injury resulted "in whole or in part" from negligence of the respondent.

*Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. ed. 1444;

*Schultz v. Pennsylvania R. Co.*, 350 U. S. 523, 76 S. Ct. 608, 100 L. ed. 668;

*Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. ed. 520;

*Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. ed. 916;

*Wilkerson v. McCarthy*, 336 U. S. 53, 69, U. S. 413, 93 L. ed. 497;

*Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 77 S. Ct. 443, 1 L. ed. 2d 493;

Authorities cited in Appendix H hereto.

II.

The state court, in holding that "the evidence in this case does not show negligence on the part of defendant" (R. 366), and that the sole cause of petitioner's injury was his own "inadvertence" (R. 364) in "turning his flat wagon too sharply" (R. 365), has decided Federal questions of substance in a way not in accord with the applicable and controlling decisions of this Court, in that:

(A) The state court, in holding as a matter of law that respondent was not negligent, failed to give petitioner the benefit of all the facts and circumstances in evidence in his favor, and all the inferences of fact which may reasonably be drawn from the evidence favorable to him.

*Webb v. Illinois Central R. Co.*, 352 U. S. 512, 513-514, 77 S. Ct. 451, 1 L. ed. 2d 503, 505;

*Wilkerson v. McCarthy*, 336 U. S. 53, 57, 69 S. Ct. 413, 92 L. ed. 497, 502;

*Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 704, 90 L. ed. 916.

(B) The state court determined the question of respondent's negligence, not from the facts and inferences as a whole in their interwoven relationship where each imparts character to the others, but from only a part of the facts and circumstances, with even those in that part separated and considered apart from each other.

*Union Pacific R. Co. v. Hadley*, 246 U. S. 330, 332, 333, 38 S. Ct. 318, 62 L. ed. 751, 755;

*Blair v. Baltimore & O. R. Co.*, 323 U. S. 600, 604, 65 S. Ct. 545, 89 L. ed. 490, 494.

(C) The state court also erroneously determined the issue of causation of petitioner's injury by its own independent resolution of the facts and circumstances in evidence, and a reweighing of the evidence and the inferences to be dedaced therefrom.

*Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 77 S. Ct. 443, 1 L. ed. 2d 493;

*Stinson v. Atlantic Coast Line R. Co.*, 355 U. S. 62, 78 S. Ct. 136, 2 L. ed. 2d 93.

III.

The state court has not respected the jury function in passing on disputed questions of fact, and has, on the contrary, usurped the function of the jury.

Authorities cited, supra, and in Appendix H hereto.

## ARGUMENT AMPLIFYING THE REASONS FOR ALLOWANCE OF THE WRIT.

I.

The state court pivoted its opinion upon its holdings that "the evidence in this case does not show negligence on the part of the defendant [respondent]" (R. 366) and that the sole cause of petitioner's injury was his own "inadvertance" (R. 364) in "turning his flat wagon too sharply" (R. 365). These questions, however, were for the jury under the applicable decisions of this Court.

It is fundamental that respondent owed petitioner the duty to use ordinary care to furnish petitioner (1) a reasonably safe place to work, (2) reasonably safe appliances with which to work, and (3) a reasonably safe method of

work. This was a continuing duty, and respondent was not relieved of its obligations because the petitioner's work at the place, by use of the appliances, or by the method in question, might have been fleeting or infrequent. *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 352-353, 63 S. Ct. 1062, 87 L. ed. 1444, 1447. In that case, with respect to the issue of a carrier's performance of these duties, it was said (319 U. S., l. c. 354, 87 L. ed., l. c. 1448):

> "To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

In *Schultz v. Pennsylvania R. Co.*, 350 U. S. 523, 524, 76 S. Ct. 608, 100 L. ed. 668, 670, this Court tersely said:

> "The jury trial 'is part and parcel of the remedy afforded railroad workers under the Employers Liability Act.'"

Certiorari to consider the failure of state courts to let such cases and the issues therein be determined by the jury is both proper and relatively commonplace (see authorities cited in Appendix H hereto). That the Missouri court erroneously so failed is readily demonstrable.

## II.

This Court has clearly and conclusively settled the aspects from which the evidence must be viewed in determining whether a case of negligence, and the issue of proximate cause, is made for the jury in cases under the Federal Employers' Liability Act.

(A) Under this Court's decisions, in determining whether a case of negligence is made for the jury, petitioner (as plaintiff) is entitled to the benefit of every fact and circumstance in his favor which the evidence tends

to prove, as well as to the benefit of every inference of fact which reasonably may be drawn from the evidence favorable to him, and the evidence of the respondent (as defendant) must be disregarded except insofar as it may tend to aid petitioner's case. *Webb v. Illinois Central R. Co.*, 352 U. S. 512, 513-514, 77 S. Ct. 451, 1 L. ed. 2d 503, 505, quoting from *Wilkerson v. McCarthy*, 336 U. S. 53, 57, 69 S. Ct. 413, 93 L. ed. 497, 502; *Lavender v. Kurn*, 327 U. S. 645, 653, 66 S. Ct. 740, 90 L. ed. 916, 923.

When considered in the light of these doctrines, the evidence in this case obviously demonstrates that respondent created a set of conditions likely to result in injury to petitioner from contact between the flat wagon and a train, when respondent (1) furnished for the use of petitioner in his work a platform which was adjacent to tracks upon which railroad trains were operated, was narrowed for use by the overhang of cars in such trains, and was obstructed by a row of large posts down its center, (2) provided petitioner, for use and movement upon that platform, with a vehicle (a flat wagon), longer than the width of the platform, and so constructed as to pivot upon its center wheels so that when one end of it was turned one way the opposite end turned the other, (3) overcrowded the platform with other standing and moving vehicles in charge of and handled by employees of respondent, (4) required petitioner to use such flat wagon and move it about upon the platform with a train in motion upon one of such adjacent tracks and another train standing upon the other adjacent track, and (5) failed to furnish plaintiff with a path over which he might move his flat wagon with reasonable safety under the circumstances existing.

Certainly no great amount of foresight would be needed to anticipate injury under these circumstances—given the facts in this record, an injury was almost inevitable.

To use the language of Mr. Justice Brennan in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 503, 77 S. Ct. 443, 1 L. ed. 2d 493, 497-498:

> "These were probative facts from which the jury could find that respondent was or should have been aware of conditions which created a likelihood that petitioner, in performing the duties required of him, would suffer just such an injury as he did."

Paraphrasing the language of Mr. Justice Douglas in the *Bailey* case, *supra* (319 U. S., l. c. 353-354, 87 L. ed., l. c. 1447):

> "* * * these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing *the petitioner* with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue * * * as well as issues involving controverted evidence * * *. To withdraw such a question from the jury is to usurp its functions." (Words in italics paraphrased, and authorities cited are omitted.)

Clearly the state court in the instant case, in reaching its conclusion that the evidence failed to show negligence on the part of respondent (R. 366) improperly reweighed the evidence and came to an independent conclusion thereon in conflict with the findings of a fully and properly instructed jury. *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29, 35, 64 S. Ct. 409, 88 L. ed. 520, 525; *Wilkerson v. McCarthy*, 336 U. S. 53, 55, 69 S. Ct. 413, 93 L. ed. 497, 501.

(B) Actually, the state court disposed of these vital issues by considering only a part, instead of all, of the

evidence. Its opinion clearly shows that it predicated its conclusions almost entirely upon its concept of what was demonstrated by the plat and cut-outs—which it apparently deemed conclusive—for in its opinion, it said (Emphasis supplied):

> "There was evidence that there may be a slight overhand of trains upon the platform adjacent thereto. However, *plaintiff's plat indicates* that the cars shown on the plat are flush with the edge of the platform and that the overhang, if any, is insignificant." (R. 362; 312 S. W. 2d, l. c. 773.)
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> * * * * * * *
>
> "This flat wagon ahead of plaintiff's was moving north at the time. Plaintiff did not intend to pass it. In fact, he could not have done so. *We do not see how this wagon in any way interfered with the operation of the plaintiff and his wagon.* This wagon was moving north and, *as shown on the plat,* it was some distance ahead of plaintiff. All plaintiff needed to do was to follow it. *That wagon ahead was not in plaintiff's way.* In what manner was the defendant negligent? Can it be said that a jury could be justified in finding that the platform, *as shown by the plat,* was overcrowded? We think not. Could a jury find that defendant was negligent in requiring these baggage and mail handlers to move their wagons toward the point where they were to be loaded with baggage while trains were moving on adjacent tracks? We think not. *Plaintiff testified that if it had not been for the wagon ahead 'I could have made it in there and got my wagon in the clear easily.'* As noted above, *and the plat conclusively shows,* the wagon ahead could not have caused plaintiff to turn his wagon so as to make contact with the train on track 5. The cause of contact between the flat wagon and

the train was plaintiff's inadvertence." (R. 363-364; 312 S. W. 2d, l. c. 773-774.)

* * * * * * *

"In the case now before us, none of the other wagons on the platform made contact with plaintiff. Plaintiff does not claim that there was anything unusual about the Cotton Belt train. It was plaintiff's act of turning his flat wagon too sharply that caused contact with the train. *Plaintiff's plat indicates* that it was not necessary for plaintiff to have turned his wagon as sharply as he did." (R. 365; 312 S. W. 2d, l. c. 774).

It will be noted from the foregoing quotations from the state court's opinion that: (a) the state court concluded, from the plat and cut-outs, that the wagon ahead of petitioner's did not interfere with his operation of his wagon, although the state court clearly recognized that petitioner testified that, had it not been for the wagon ahead, "I could have made it in there and got my wagon in the clear easily" (R. 128); (b) the state court concluded, from the plat and the cut-outs,[1] that the platform was not crowded, by the simple process of ignoring the direct evidence that "the platform was crowded" (R. 116, 171, 330), as well as the corroborative evidence that there were as

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[1] The positioning of the cut-outs on the plat by plaintiff, in the course of his testimony, was obviously the making of approximations by him (R. 51, 53, 54, 55, 62-63). Although the plat and cut-outs show only 4 flat wagons between the north elevator and the standing bull wagons, the evidence was that there were as many as 7 flat wagons in that area (R. 137, 270, 299), and even the state court's opinion shows that the plat and cut-outs did not demonstrate all of the vehicles involved, for it says: "The two [bull wagons] here involved had a tractor (*not shown* on the plat) attached at the north" (R. 362; 312 S. W. 2d, l. c. 773), after previously having said, "Track 4 shows a 'cut-out' of only one car of the Pennsylvania train standing thereon. (*There were other cars not shown.*)" (R. 360; 312 S. W. 2d, l. c. 771.)

many as 7 flat wagons in the area (R. 137, 270, 299), instead of only 4 as shown on the plat; and (c) that the state court disregarded the evidence that the crowding of the platform made it difficult, if not impossible, for petitioner to turn his flat wagon and "keep it in the clear" (R. 125, 128, 171).

The state court, in passing upon the issue of respondent's negligence, oversimplified the issue by considering separately and apart a portion of the various facts and factors entering into the determination of that issue. That such process is unwarranted, in order to take a F. E. L. A. case from a jury, is firmly established. In *Union Pacific R. Co. v. Hadley,* 246 U. S. 330, 332, 38 S. Ct. 18, 62 L. ed. 751, 755, Mr. Justice Holmes said:

> "On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as to each. But the whole may be greater than the sum of its parts, and the court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct, viewed as a whole, warranted a finding of neglect. Upon that point there can be no question."

and, further (246 U. S., l. c. 333, 62 L. ed., l. c. 755):

> "We must look at the situation as a practical unit * * *."

In *Blair v. Baltimore & O. R. Co.,* 323 U. S. 600, 604, 65 S. Ct. 545, 89 L. ed. 490, 494, on this same subject, Mr. Justice Black said:

> "The negligence of the employer may be determined by viewing its conduct as a whole. * * * And

> especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others."

(C) The Missouri court not only erred in holding as a matter of law that there was no evidence of negligence on the part of respondent (R. 366), but it is apparent that it also erroneously held as a matter of law that any such negligence was not the proximate cause of petitioner's injury, for it held that the sole cause of his injury was his own "inadvertence" (R. 364) in "turning his flat wagon too sharply" (R. 365). This, despite the fact that the evidence showed a flat wagon ahead of petitioner was in his way—which would cause him to turn his wagon more sharply—and that, if that wagon had not been in his way, he could have made the turn easily and gotten into the clear—all of which made it inferrable that the negligence of respondent, as hypothesized in Instruction No. 1 (R. 338-340) played a part in petitioner's injury.

In so holding, the Missouri court failed to follow the established and controlling principle enounced by this Court in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 506-508, 77 S. Ct. 443, 1 L. ed. 2d 493, 499-500, as follows:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. * * * Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry of whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. * * * The Congress, when adopt-

> ing the law was particularly concerned that the issues whether there was employer fault and whether that fault played any part in the injury or death of the employee should be decided by the jury whenever fair minded men could reach these conclusions on the evidence."

See, also, other authorities cited in Appendix H hereto.

In the case at bar, the jury was properly instructed by Instruction No. 1 (R. 338-340) upon the issue of respondent's negligence, and its effect if it had any part in producing petitioner's injury. The jury was also carefully instructed, by Instruction No. 4 (R. 340-341), as to its verdict if it should find that petitioner's injury resulted solely from his own acts and conduct. The jury was further carefully instructed, by Instructions Nos. 5 (R. 341-342) and 7 (R. 343-344) as to the effect of combined and concurrent negligence of both petitioner and respondent as causative factors in petitioner's injury. By its general verdict (R. 349) the jury necessarily found that respondent was negligent, and that such negligence played a part in petitioner's injury.[2]

The Missouri court, in arriving at its conclusion that the sole cause of petitioner's injury was his own conduct, as in arriving at its conclusion that respondent was not negligent, necessarily reweighed the evidence and made its independent resolution thereof in conflict with the findings of a properly and fully instructed jury. This is not permissible under the rule laid down by this Court in *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29, 35, 64 S. Ct. 409, 88 L. ed. 520, 525, as follows (emphasis supplied):

> "The focal point of judicial review is the reasonableness of the particular inference or conclusion *drawn*

[2] From the amount of its verdict, in the light of the nature of petitioner's injury, the jury evidently also found that petitioner was contributorily negligent.

*by the jury.* It is the jury, not the court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of the witnesses, receives expert instructions, *and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.* * * * That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. *Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.*"

IV.

Certainly, under the evidence in this case, and the principles announced by this Court in similar cases—the more recent of which are collected in Appendix H hereto—a jury of fair-minded men should be permitted to find under the statute that respondent was negligent and that said negligence contributed "in part" to cause petitioner's injuries.

The holding by the Missouri court to the contrary constituted a usurpation of the function of the jury contrary to the applicable and controlling decisions of this Court.

## PRAYER.

For the reasons herein given, and in view of the close analogy of this case with recent decisions of this Court in actions under the Federal Employers' Liability Act, petitioner prays for a Writ of Certiorari directed to the Supreme Court of the State of Missouri to the end that the judgment of that Court may be reviewed by this Court

and such judgment reversed with directions that the judgment of the trial court be affirmed.

Respectfully submitted,

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St. Louis 2, Missouri,
Counsel for Petitioner.

GEORGE E. HELFERS,
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## APPENDIX A.

### Opinion of the Supreme Court of Missouri.

April 14, 1958.

(R. 357-367)

In the Supreme Court of Missouri,
Division Number One,
January Session, 1958.

John Henry Moore,
Plaintiff-Respondent,
vs.
Terminal Railroad Association of St. Louis, a Corporation,
Defendant-Appellant.

No. 46366.

Appeal From the Circuit Court of the City of St. Louis,
Hon. John C. Casey, Judge.

On September 18, 1955, plaintiff John Henry Moore was, as he had been for about ten years, in the employ of the defendant Terminal Railroad Association of St. Louis as a mail and baggage handler. About 10:30 a. m., on that day, he was injured while he was pulling an empty flat wagon along the concrete platform between tracks 4 and 5 where he was to meet a Cotton Belt train at Union Station in St. Louis, Missouri. Plaintiff sustained his injuries when the Cotton Belt train backing into the Union Station came in contact with the flat wagon plaintiff was pulling in a northwesterly direction, causing him to be pushed against a Pennsylvania Railroad train standing on track 4 west of track 5. Moore filed this suit asking damages for his injuries. A jury trial resulted in a verdict in his

favor for $10,000. From the judgment entered, the defendant appealed.

Defendant's principal point briefed is that the evidence is insufficient to show any negligence on the part of the railroad. Plaintiff's claim must be governed by the Federal Employers' Liability Act.

The case was submitted to a jury on the theory that defendant failed to furnish plaintiff a reasonably safe place to work. The question of whether defendant was negligent was submitted as follows:

"* * * and if you further find that at the time of said occurrence and injury to plaintiff, said platform was so overcrowded and congested with tractors, bull wagons, flat wagons and similar vehicles, used by defendant for the hauling of mail, express and baggage, if you so find, and that said platform and its parts and appliances, and said flat wagon being pulled by plaintiff, were such, by reason of their size, type of construction and arrangement, if you so find, as to make it likely that said flat wagon being pulled by plaintiff along said platform would be struck by trains or cars moving over and along the tracks adjacent to said platform; and if you further find that defendant required plaintiff to work, and pull the said flat wagon being pulled by him, on said platform under the circumstances aforesaid (if you find them to be the circumstances), and that in so doing, if you so find, defendant failed to exercise ordinary care and was guilty of negligence; and if you further find that the aforesaid occurrence and injury to plaintiff directly resulted, in whole or in part, from the aforesaid negligence of defendant (if you find defendant was negligent as aforesaid), then your verdict herein must be in favor of the plaintiff, * * *."

For a better understanding of the situation, we are including herein a picture of Plaintiff's Exhibit 8 which is a plat of the scene and is drawn to scale:

So there may be no confusion in directions, we note here that track 3 (shown at left on plat) runs north and south and is west of tracks 4 and 5 between which is the platform in question. Track 4 shows a "cut-out" of only one car of the Pennsylvania train standing thereon. (There were other cars not shown.) On track 5 are "cut-outs" of Cotton Belt cars moving north. The platform is 14′ 1⅜″ wide. The north elevator is at the south end of the plat. The small circles in the center of the platform indicate the location of posts (14″ in diameter) which are 30′ apart. They support a roof over the platform. The two "cut-outs" at top right are stationary bull wagons. The two "cut-outs" at top left on west side of the platform are flat wagons moving north. The single "cut-out" on angle is the flat wagon being pulled by plaintiff as the rear end thereof turned into the moving Cotton Belt train. The remaining "cut-out" shown nearest the north elevator represents a flat wagon being pulled north by a witness Robinson.

We also include herein Defendant's Exhibit A which is a photograph of the scene without trains on either track 4 or track 5:

(Because of the size of the picture, it is included in the typewritten copy of the opinion with the top thereof at the right side of the typed page.)

The picture was taken looking south. A flat wagon such as plaintiff was pulling when injured may be seen standing on the platform. There was evidence that there may be a slight overhang of trains upon the platform adjacent thereto. However, plaintiff's plat indicates that the cars shown on the plat are flush with the edge of the platform and that the overhang, if any, is insignificant.

A flat wagon, such as plaintiff was using is 15′ long and 44″ wide when measured from "axle to axle" of its two large center wheels. This flat wagon has one small wheel at each end thereof. When stationary the wagon rests on one of these small wheels. It has a handle bar at each end. It pivots on the two large center wheels when it is turned so the ends swing in opposite directions. The bull wagons shown on the plat, as is obvious, are shorter than the flat wagons, have four wheels and a tongue, and are drawn either by hand or by small tractor. The two here involved had a tractor (not shown on plat) attached at the north.

Plaintiff testified that he with his wagon came up to the platform from the sub-basement by way of an elevator some distance south of the elevator marked on the plat "north elevator"; that he pulled his wagon north along the east side of the platform and when he was at the north elevator the first car (actually the rear end) of the Cotton Belt train was passing him as it backed into Union Station on track 5; that he continued on north and after passing the second post north of the north elevator he turned to the west intending to by-pass the two bull wagons standing on the east side of the platform; that while he was turning the back end of the wagon came in contact with the moving train on track 5; that the moving train pushed him and the front end of the wagon against the train standing on track 4 to the west, causing him to be seriously injured. The bull wagons had been placed where shown on the plat for the purpose of being loaded with milk to be taken from the Cotton Belt train. All of the flat wagons shown on the plat were in motion at the time, being drawn by hand.

They were intended to be taken north of the bull wagons for the purpose of being loaded with mail and baggage from the Cotton Belt train. Plaintiff testified that another reason for his turning to the west to by-pass the bull wagons was, "Well, I didn't feel very safe with that Cotton Belt running along there beside me and I wanted to get out of the way of it."

On cross-examination plaintiff testified as follows:

"Q. Isn't it a fact that what really happened is that you didn't know just how close the south end of your truck was to that train?

"A. Well, I did think I was turning safely, which I tried, and if it hadn't been for this wagon in front of me I could have made it easy.

"Q. What wagon was that?

"A. This flat here in front.

"Q. If it hadn't been for that you could have made what easily?

"A. I could have made it in there and got my wagon in the clear easy.

"Q. You could have gotten in the clear easily?

"A. Yes, sir.

"Q. And that's what you were trying to do?

"A. Yes, sir, that is what I was trying to do.

"Q. All right.

"A. I didn't feel very safe with that train running along beside me."

The flat wagon which plaintiff was referring to is the one shown on the west side of the platform and north of the one in a crisscross position which plaintiff was pulling. This flat wagon ahead of plaintiff's was moving north at the time. Plaintiff did not intend to pass it. In fact, he could not have done so. We do not see how this wagon in any way interfered with the operation of the plaintiff and his wagon. This wagon was moving north and, as shown on the plat, it was some distance ahead of plaintiff. All

plaintiff needed to do was to follow it. That wagon ahead was not in plaintiff's way. In what manner was the defendant negligent? Can it be said that a jury could be justified in finding that the platform, as shown by the plat, was overcrowded? We think not. Could a jury find that defendant was negligent in requiring these baggage and mail handlers to move their wagons toward the point where they were to be loaded with baggage while trains were moving on adjacent tracks? We think not. Plaintiff testified that if it had not been for the wagon ahead "I could have made it in there and got my wagon in the clear easily." As noted above, and the plat conclusively shows, the wagon ahead could not have caused plaintiff to turn his wagon so as to make contact with the train on track 5. The cause of the contact between the flat wagon and the train was plaintiff's inadvertence.

Plaintiff has cited many cases to sustain his contention that the evidence is sufficient to sustain a finding of negligence on the part of the defendant. We shall refer to a number of these to demonstrate that the courts of this state and the Supreme Court of the United States, while liberal to plaintiffs in cases under the Federal Employers' Liability Act, nevertheless hold that a judgment for a plaintiff must be supported by evidence which justifies a finding of negligence. A verdict cannot be sustained on mere speculation and conjecture. Plaintiff, in his brief, says, "The evidence, when viewed in the light most favorable to plaintiff, as it must be, is amply sufficient to sustain the jury's finding that the defendant violated its duty to plaintiff to furnish him with a reasonably safe environment in his work for defendant. It was the function of the jury to determine which of the facts in evidence should be accepted, and what reasonable inferences should be drawn therefrom (even if 'a measure of speculation and conjecture is required'), in determining whether negligence of the defendant played any part, however small, in plaintiff's injury." The quotation in plaintiff's statement

"(even if 'a measure of speculation and conjecture is required')," taken from an opinion by Justice Murphy in the case of Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, l. c. 744 (4-6), was referred to in Wiser v. Missouri Pacific R. Co., Mo., 301 S. W. (2d) 37, l. c. 44 (6, 7), and in Winters v. Terminal R. Assn. of St. Louis, 363 Mo. 606, 252 S. W. (2d) 380, l. c. 384 (6).

In the Wiser and Winters cases cited by plaintiff there was evidence from which negligence could be inferred. In the Wiser case the plaintiff testified that while he was inspecting railroad cars he slipped and fell over a rock imbedded in ballast on the track. In the Winters case the plaintiff's hand was mashed as he was pulling a baggage truck when another such truck suddenly ran against plaintiff.

In the case now before us none of the other wagons on the platform made contact with plaintiff. Plaintiff does not claim that there was anything unusual about the Cotton Belt train. It was plaintiff's act of turning his flat wagon too sharply that caused contact with the train. Plaintiff's plat indicates that it was not necessary for plaintiff to have turned his wagon as sharply as he did.

In the Winters case, supra, 252 S. W. (2d), l. c. 384 (4, 5), it is stated that "But the burden is upon the plaintiff to present probative evidence of facts from which negligence and proximate cause may be reasonably inferred." The evidence in the case before us not only does not justify an inference of negligence on the part of the defendant, but in our opinion disproves any such negligence.

Before concluding this opinion we shall refer to a few of the other cases cited by plaintiff. In Rogers v. Missouri Pacific R. Co., 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. (2d) 493, the United States Supreme Court pointed out that Rogers, a section-gang laborer, according to instruction, stopped his weed burning to inspect a passing train for hot boxes and slipped and fell while retreating from

flames fanned by the passing train. The court held that a jury could find that the employer should have been aware that the employee would suffer an injury under such conditions. The court further pointed out that Rogers slipped on gravel which had negligently been left on the surface of a culvert. The opinion in the Rogers case by this court, after remand from the United States Supreme Court, may be found at 308 S. W. (2d) 688.

In Ellis v. Union Pacific R. Co., 329 U. S. 649, 67 S. Ct. 598, a member of a switching crew was injured when a car moved past him on a curve and pinned the upper part of his body against a building. The clearance between the car and the building was insufficient.

In Bailey v. Central Vermont Ry., Inc., 319 U. S. 350, 63 S. Ct. 1062, a railroad workman fell to his death when using a wrench to open the doors of a hopper car. The car had been placed on a bridge. It was shown that the car could have been placed near the bridge on level ground and there opened. The court held that it was for a jury to determine whether the car had been negligently so placed as to render the place unsafe f r the workman.

The rule followed in these Federal Employers' Liability cases is well stated in the Ellis case, supra, 67 S. Ct., l. c. 600 (2, 3): "The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be 'in whole or in part' the cause of the injury."

Since we have concluded that the evidence in this case does not show negligence on the part of the defendant, we need not consider other points briefed.

The judgment is reversed.

Henry J. Westhues,
Judge.

## APPENDIX B.

### Judgment.

Entered April 14, 1958 (R. 356)

John Henry Moore, Respondent,

vs. Appeal from the Circuit Court of the City of St. Louis.

Terminal Railroad Association of St. Louis, a corporation, Appellant.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which it has lost by reason of the said judgment; and that the said appellant recover against the said respondent its costs and charges herein expended, and have execution therefor.

## APPENDIX C.

**Motion for Rehearing, etc.**

**(R. 369-379.)**

**Filed April 26, 1958.**

**(R. 368.)**

**Overruled May 12, 1958.**

**(R. 380.)**

**In the**
**Supreme Court of Missouri,**
**Division No. 1.**

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**January Session, 1958.**

**John Henry Moore,**
**Plaintiff-Respondent,**
**vs.**
**Terminal Railroad Association of St. Louis, a Corporation,**
**Defendant-Appellant.**

**No. 46,366.**

**Appeal from the Circuit Court of the City of St. Louis, Missouri, Division No. 17,**
**Honorable John C. Casey, Judge Presiding.**

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**Motion of Respondent for a Rehearing, or, in the Alternative, to Transfer to the Court En Banc.**

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Comes now John Henry Moore, plaintiff-respondent in the above entitled cause, and moves the Court to set aside

and vacate its opinion, decision and judgment rendered and entered in this cause on April 14, 1958, and to grant plaintiff-respondent a rehearing herein, or in the alternative to transfer this cause to the Court En Banc, for the following reasons:

1. The Court, as shown by its opinion, in holding that the evidence did not make out a submissible case of negligence of defendant, based such holding upon a minor portion of plaintiff's testimony, together with certain matters shown by a plat and "cut outs" placed thereon, rather than upon all the evidence favorable to plaintiff, when such evidence not only demonstrated the plat to be incomplete and the positioning of the "cut outs" to be approximations, but was sufficient to make out a submissible case of the negligence of defendant submitted by the instructions.

2. The Court, as shown by its opinion, failed to give the plaintiff the benefit of all of the evidence favorable to him, and the benefit of all inferences favorable to plaintiff to be reasonably drawn from such evidence, in determining whether a case was made for the jury on the issue of defendant's negligence, contrary to the controlling decisions in *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 351, 63 S. Ct. 1062, 87 L. ed. 1444, 1446; *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 67-68, 63 S. Ct. 444, 87 L. ed. 610, 618; *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29, 32-33, 64 S. Ct. 409, 88 L. ed. 520, 524; *Lavender v. Kurn*, 327 U. S. 645, 652-653, 66 S. Ct. 740, 90 L. ed. 916, 922-923; *Ellis v. Union Pacific R. Co.*, 329 U. S. 649, 653, 67 S. Ct. 598, 91 L. ed. 572, 576; *Myers v. Reading Co.*, 331 U. S. 477, 485-486, 67 S. Ct. 1334, 91 L. ed. 1615, 1620; *Wilkerson v. McCarthy*, 336 U. S. 53, 57, 69 S. Ct. 413, 913 L. ed. 497, 502; *Stone v. New York C. & St. L. R. Co.*, 344 U. S. 407, 409, 73 S. Ct. 358, 97 L. ed. 441, 445; and other decisions cited herein, particularly *Webb v. Illinois Central R. Co.*, 352 U. S. 512, 513-514, 77 S. Ct. 451, 1 L. ed. 2d 503, 505.

3. The Court, as shown by its opinion failed to follow the established and controlling doctrine of the Federal courts, in cases under the F. E. L. A., such as this one is, to the effect that under this statute the test of a jury case is simply whether

> "* * * the proofs justified with reason **the jury's conclusion** that employer negligence played a part in producing petitioner's [the employee's] injury." (Emphasis and bracketed portion supplied.),

and, in so failing, this Court failed to follow the controlling decisions in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 1 L. ed. 2d 493, 77 S. Ct. 443; *Webb v. Illinois Central R. Co.*, 352 U. S. 512, 1 L. ed. 2d 77 S. Ct. 451; *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U. S. 521, 1 L. ed. 2d 511, 77 S. Ct. 457; *Arnold v. Panhandle & S. F. R. Co.*, 353 U. S. 360, 1 L. ed. 2d 889, 77 S. Ct. 840; *Gibson v. Thompson*, 355 U. S. 18, 2 L. ed. 2d 1, 78 S. Ct. 2; and *Honeycutt v. Wabash R. Co.*, 355 U. S. 424, 2 L. ed. 2d 280, 78 S. Ct. 393, reversing (Mo. App.) 303 S. W. 2d 153, among other recent decisions. The Court has not respected the jury's function in passing on disputed questions of fact, and the inferences and conclusions to be drawn from facts in evidence, and has set aside the jury's verdict by reweighing the evidence and considering only a portion thereof as conclusive and exclusive, which it was not—all contrary to the controlling decisions of the Supreme Court of the United States in the cases just above cited and other cases, particularly *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 2d 35, 64 S. Ct. 409, 88 L. ed. 520, 525.

4. By reason of the foregoing, the Court, as shown by its opinion, has overlooked or misinterpreted material matters of fact, or law, or both.

George E. Helfers, and
Roberts P. Elam,
Attorneys for Plaintiff-Respondent.

**Suggestions in Support of Motion.**

This Court, on page 2 of its opinion, set out the essential portions of the instruction submitting the question of defendant's negligence, which instruction predicated such negligence upon findings that the platform was so overcrowded and congested, by reason of the number of vehicles on the platform, and the size, type of construction and arrangement of the platform, the vehicles and the other appliances involved, as to make it likely that injury would result.

This Court then went on in its opinion to consider a plat which had been introduced in evidence, together with some "cut outs" which had been used to demonstrate on the plat the approximate positions of some of the instrumentalities involved. The Court noted that the plat was incomplete, for on page 4 of its opinion it parenthetically noted that but one car of a Pennsylvania train on track 4 was shown, and on page 6 of its opinion it again noted parenthetically that the tractors attached to the bull wagons were not shown on the plat. The Court in its opinion then went on to state that the evidence tended to show two reasons for plaintiff turning his flat wagon so as to go from the east to the west side of the platform, namely: (1) to get around the standing bull wagons [Opinion, p. 6], and (2) because he didn't feel safe with the Cotton Belt train running alongside him on track 5, and he wanted to get out of the way of it. [Opinion, p. 7]; and then, after pointing out plaintiff's testimony on cross-examination to the effect that he thought he was "turning safely" and "could have made it easy * * * into the clear" if the flat wagon in front of him had not been there [Opinion, p. 7], this court went on to say [Opinion, pp. 7-8]:

> "This flat wagon ahead of plaintiff's was moving north at the time. Plaintiff did not intend to pass it. In fact, he could not have done so. We do not see how

this wagon in any way interfered with the operation of the plaintiff and his wagon. This wagon was moving north and, **as shown on the plat,** it was some distance ahead of plaintiff. All plaintiff needed to do was to follow it. That wagon ahead was not in plaintiff's way. In what manner was the defendant negligent? Can it be said that a jury could be justified in finding that the platform, **as shown by the plat,** was overcrowded? We think not. Could a jury find that defendant was negligent in requiring these baggage and mail handlers to move their wagons toward the point where they were to be loaded with baggage while trains were moving on adjacent tracks? We think not. Plaintiff testified that if it had not been for the wagon ahead 'I could have made it in there and got my wagon in the clear easily.' As noted above, and **the plat conclusively shows,** the wagon ahead could not have caused plaintiff to turn his wagon so as to make contact with the train on track 5. The cause of the contact between the flat wagon and the train was plaintiff's inadvertence." (Emphasis supplied.)

and, further [Opinion, p. 9]:

> "It was plaintiff's act of turning his flat wagon too sharply that caused contact with the train. **Plaintiff's plat indicates** that it was not necessary for plaintiff to have turned his wagon as sharply as he did." (Emphasis supplied.)

These were the bases for this Court's conclusion and holding that the evidence failed to show negligence on defendant's part.

## I.

We submit, respectfully but vigorously, that the above emphasized portions of this Court's opinion demonstrates that the Court inadvertently overlooked evidence, of which

plaintiff was entitled to the benefit in the determination of whether a case was made for the jury. The question is not whether, **as shown by the plat,** the wagon ahead of plaintiff was some distance ahead of him, so as to not be in his way, but whether, **under all the evidence** favorable to plaintiff, that other wagon was in his way and caused him to turn his wagon in such manner as to collide with the Cotton Belt train; and, not only does the opinion, including the portion of plaintiff's cross-examination quoted on page 7 and again on page 8 of the opinion, from page 128 of the Transcript on Appeal, show that **if it hadn't been for that wagon plaintiff could easily have made the turn without incident,** but other portions of the evidence similarly established the facts to be **that the flat wagon ahead of plaintiff was in his way and interfered with the operation of plaintiff and his wagon so as to cause it to come into contact with the train** (Tr. 125, 171). In addition, the plat in question shows only four (4) flat wagons to have been in the area in question, while **there was affirmative evidence that there were as many as seven (7) flat wagons in the area between the bull wagons and the north elevator** (Tr. 137, 270, 299). If there is any conflict between what the plat shows, and what **all of the evidence** shows, with respect to whether the wagon ahead of plaintiff could have caused him to turn his wagon so as to make contact with the train on track 5, such conflict was for the determination of the jury. In holding the plat conclusive on this phase of the matter, this Court, obviously, either overlooked, misconceived or misinterpreted the facts in evidence or the law, or both.

Likewise, the question in this case is not whether the jury would be justified in finding that the platform, **as shown by the plat** was overcrowded, but whether the jury would be justified in finding, **from all the evidence,** that the platform was overcrowded; and, while the plat and the "cut outs" indicate that there were only four (4) flat

wagons in the area, there was positive testimony tending to establish that **there were as many as seven (7) flat wagons in the area between the bull wagons and the north elevator** (Tr. 137, 270, 299). We respectfully request the Court to re-examine the plat in question, assume that there were seven (7) flat wagons **in the area between the bull wagons and the north elevator**, and then consider whether the platform was overcrowded. And, in addition, we wish to again, as we did at page 5 of our brief herein, point out to the Court that **there was and is in the record, both in plaintiff's case** (brought out there by defendant's counsel in his cross-examination of plaintiff and one of plaintiff's witnesses) **and in defendant's case, specific evidence that "the platform was crowded" at the time and place of plaintiff's injury** (Tr. 116, 171, 330). Furthermore, plaintiff's evidence was specifically that **this crowding of the platform made it difficult, if not impossible, for plaintiff to turn his wagon and "keep it in the clear"** (Tr. 125, 128, 171). Certainly the jury was justified, under that evidence, in finding that the platform was overcrowded, and this Court manifestly overlooked or misinterpreted that evidence and the legal effect thereof, and consequently fell into grievous error, in holding that a jury could not be justified in finding that the platform was overcrowded.

The opinion of the Court demonstrates that the Court, in passing upon the issue of whether a case was made for the jury has considered as conclusive, and as exclusive, the matters shown by the addition of some "cut outs" on the plat offered in evidence, notwithstanding that such showing is manifestly incomplete, does not even purport to demonstrate all of the facts in evidence, and only by reason of its omissions conflicts with facts shown by the testimony of witnesses highly favorable to plaintiff's position, and which establishes the negligence of defendant submitted.

II.

As we pointed out at page 10 of our brief in this case, quoting from *Young v. Wheelock*, 330 Mo. 992, 64 S. W. 2d 950, 954, it is settled law that, in determining whether a case of negligence is made for the jury, the plaintiff is entitled to the benefit of every fact and circumstance in his favor which the evidence tends to prove, and to the benefit of every inference of fact which reasonably may be drawn from the evidence favorable to him; and the defendant's evidence must be disregarded, except insofar as it may tend to aid plaintiff's case; and it can be said that plaintiff has failed to make out a case for the jury only when the facts in evidence and the legitimate inferences to be drawn from such facts are so strongly against plaintiff as to leave no room for reasonable minds to differ. These doctrines are settled in F. E. L. A. cases by a large number of the more recent decisions of the Supreme Court of the United States, including: *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 351, 63 S. Ct. 1062, 87 L. ed. 1444, 1446; *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 67-68, 63 S. Ct. 444, 87 L. ed. 610, 618; *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29, 32-33, 64 S. Ct. 409, 88 L. ed. 520, 524; *Lavender v. Kurn*, 327 U. S. 645, 652-653, 66 S. Ct. 740, 90 L. ed. 916, 922-923; *Ellis v. Union Pacific R. Co.*, 329 U. S. 649, 653, 67 S. Ct. 598, 91 L. ed. 572, 576; *Myers v. Reading Co.*, 331 U. S. 477, 485-486, 67 S. Ct. 1334, 91 L. ed. 1615, 1620; *Wilkerson v. McCarthy*, 336 U. S. 53, 57, 69 S. Ct. 413, 913 L. ed. 497, 502; *Stone v. New York, C. & St. L. R. Co.*, 344 U. S. 407, 409, 73 S. Ct. 358, 97 L. ed. 441, 445; and other decisions cited herein, particularly *Webb v. Illinois Central R. Co.*, 352 U. S. 512, 513-514, 77 S. Ct. 451, 1 L. ed. 2d 503, 505.

It seems manifestly plain, in the light of the evidentiary facts emphasized by us under Point I of these suggestions, that this Court overlooked, misinterpreted or misapplied

these legal principles when it concluded that this plaintiff-respondent failed to make out a case for the determination of the jury.

## III.

As we have earlier pointed out, and as the opinion of this Court shows, the jury was instructed as to plaintiff's theory of negligence (Instruction No. 1, Tr. 338-340). The jury was also carefully instructed that, if plaintiff's injury resulted solely from his own conduct in so turning his flat wagon as to bring it into contact with the Cotton Belt train, and that defendant was not negligent as submitted, the verdict should be for defendant (Instruction No. 4, Tr. 340-341). Further, the jury was instructed that, if both defendant and plaintiff were negligent, and plaintiff's injury resulted from such concurring negligence, then the amount of his damages should be reduced proportionately (Instructions Nos. 5 and 7, Tr. 341-342, 343-344). Thus, the jury was fully instructed upon all phases of defendant's liability vel non. The jury, under the instructions, found for plaintiff.

Under these circumstances, we submit, this case is controlled by the determination of the jury, in the light of the doctrine that:

> "* * * the proofs justified with reason **the jury's conclusion** that employer negligence played a part in producing the employee's injury."[1] (Emphasis supplied),

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[1] Quoted verbatim, or with but immaterial change, from *Gibson v. Thompson*, 355 U. S. ..., 78 S. Ct. ..., 2 L. ed. 2d 1, 2; *Honeycutt v. Wabash R. Co.*, 355 U. S. ..., 78 S. Ct. ..., 2 L. ed. 2d 380; *Arnold v. Panhandle & S. F. R. Co.*, 353 U. S. 360, 77 S. Ct. 840, 1 L. ed. 2d 889, 891; *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U. S. 521, 523, 77 S. Ct. 457, 1 L. ed. 2d 511, 514; *Webb v. Illinois Central R. Co.*, 352 U. S. 512, 516, 77 S. Ct. 451, 1 L. ed. 2d 503, 507; *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 506, 77 S. Ct. 443, 1 L. ed. 2d 493, 499.

and that, in arriving at its conclusion that plaintiff failed to make a case for the jury, this Court has overlooked, misinterpreted or misapplied not only the above quoted doctrine, but also the established doctrines that (emphasis supplied):

> "The focal point of judicial review is the reasonableness of the particular inference or conclusion **drawn by the jury.** It is the jury, not the court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of the witnesses, receives expert instructions, **and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.** * * * That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. **Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.**" *Tennant v. Peoria & P. U. R. Co.*, supra, 321 U. S., l. c. 35, 88 L. ed., l. c. 525.
>
> "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. **Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities.**" *Rogers v. Missouri Pacific R. Co.*, supra, 352 U. S., l. c. 507, 1 L. Ed. 2d, l. c. 499-500.

## Conclusion.

For the reasons and upon the authorities hereinbefore referred to, plaintiff-respondent respectfully submits that this Court, as shown by its opinion, overlooked or misinterpreted material matters of fact or law, or both, in holding that plaintiff-respondent failed to make a case for the jury. To the end that such oversight or misinterpretation may be corrected, plaintiff-respondent submits that his motion for rehearing, or in the alternative to transfer to the Court En Banc, should be sustained.

Respectfully submitted,

George E. Helfers and
Roberts P. Elam,
Attorneys for Plaintiff-Respondent.

## APPENDIX D.

### State Courts; Appeal; Certiorari.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. Code, Sec. 1257.

## APPENDIX E.

### The Federal Employers' Liability Act.

Every common carrier by railroad while engaging in commerce between any of the several states or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. April 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404; 45 U. S. Code, Sec. 51.

## APPENDIX F.

### Contributory Negligence; Diminution of Damages.

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. April 22, 1908, c. 149, Sec. 3, 35 Stat. 66; 45 U. S. Code, Sec. 53.

## APPENDIX G.

### Assumption of Risks of Employment.

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. April 22, 1908, c. 149, Sec. 4, 35 Stat. 66; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404; 45 U. S. Code, Sec. 54.

## APPENDIX H.

(Cases Decided Concurrently With or Since Rogers v. Missouri Pacific R. Co., 352 U. S. 500, 77 S. Ct. 443, 1 L. ed. 2d 493, and Reaffirming the Principles Thereof.)

Webb v. Illinois Central R. Co., 352 U. S. 512, 77 S. Ct. 451, 1 L. ed. 2d 503;

Ferguson v. Moore-McCormack Lines, Inc., 352 U. S. 521, 77 S. Ct. 457, 1 L. ed. 2d 511;

*Shaw v. Atlantic Coast Line R. Co., 353 U. S. 920, 77 S. Ct. 680, 1 L. ed. 718;

*Futrelle v. Atlantic Coast Line R. Co., 353 U. S. 920, 77 S. Ct. 682, 1 L. ed. 2d 718;

*Deen v. Gulf, C. & S. F. R. Co., 353 U. S. 925, 77 S. Ct. 715, 1 L. ed. 2d 721;

*Thompson v. Texas & P. R. Co., 353 U. S. 926, 77 S. Ct. 698, 1 L. ed. 2d 722;

Baltimore & O. R. Co. v. Jackson, 353 U. S. 25, 77 S. Ct. 842, 1 L. ed. 2d 862;

Arnold v. Panhandle & S. F. R. Co., 353 U. S. 360, 77 S. Ct. 480, 1 L. ed. 2d 889;

Ringhiser v. Chesapeake & O. R. Co., 354 U. S. 901, 77 S. Ct. 1093, 1 L. ed. 2d 1268;

*McBride v. Toledo Terminal R. Co., 354 U. S. 517, 77 S. Ct. 1398, 1 L. ed. 2d 1534;

*Gibson v. Thompson, 355 U. S. 18, 78 S. Ct. 2, 2 L. ed. 2d 1;

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* In these cases, there were writs of certiorari issued and reversals of the lower courts without argument of the cause.

*Palermo v. Luckenbach S. S. Co., 355 U. S. 20, 78 S. Ct. 1, 2 L. ed. 2d 3;

*Stinson v. Atlantic Coast Line R. Co., 355 U. S. 62, 78 S. Ct. 136, 2 L. ed. 2d 93;

*Honeycutt v. Wabash R. Co., 355 U. S. 424, 78 S. Ct. 393, 2 L. ed. 2d 380;

Kernan v. American Dredging Co., 355 U. S. 426, 78 S. Ct. 394, 2 L. ed. 2d 382;

*Ferguson v. St. Louis-S. F. R. Co., 356 U. S. ..., 78 S. Ct. 671, 2 L. ed. 2d 571;

Sinkler v. Missouri Pacific R. Co., 356 U. S. ..., 78 S. Ct. 758, 2 L. ed. 2d 799.

* In these cases, there were writs of certiorari issued and reversals of the lower courts without argument of the cause.

FILED
AUG 1 4 1958
JOHN T. FEY, Clerk

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 208

JOHN HENRY MOORE,
Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF
ST. LOUIS, a Corporation,
Respondent.

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### I.

### STATEMENT OF THE CASE.

We will refer to Petitioner as "plaintiff" and to Respondent as "defendant." Plaintiff was an employee of defendant railroad and was injured in the course of his employment. His cause of action is governed by the provisions of the Federal Employers' Liability Act.

Our chief purpose and function herein is to set facts straight. We cannot disagree with the basic law—instead we rely upon it, because in each instance it is pointed out

that there must be negligence of the railroad before the employee can recover for his injuries. In view of the uncontroverted facts of this case, we are content that this Court will agree with our State Supreme Court that there was no negligence of defendant.

This Court has not in every instance granted certiorari and reversed in cases under the Federal Employers' Liability Act where judgment has been entered for defendant in a court below. Witness the cases of:

**Terminal Railroad Association of St. Louis v. Barnett,** 345 U. S. 956, 73 S. Ct. 938, 97 L. ed. 1377;
**Milom v. New York Central Railroad Co.,** ... U. S. ..., 2 L. ed. 2d 529.

The facts basic to plaintiff's accident are that he was in Union Station, St. Louis, Missouri, pulling a wagon along a platform which lay between two tracks (R. 42). To his left was a standing train—to his right was a moving train (R. 49), and his intention was to move to a point where he would unload onto the wagon some baggage from a certain car of the moving train, after it came to a stop (R. 32, 69).

Other employees were performing similar functions on that same platform, either moving or standing at various points along the 1800-foot platform (R. 309). Only two of the other wagons enter into the picture of plaintiff's accident, as will be seen in this brief statement of the accident.

Plaintiff was moving along the right-hand side of the platform (R. 49), and he came to a point where a **standing** wagon (No. 1) blocked his way on that side (R. 68). Since he was headed for a point several hundred feet further north up the platform (R. 57), it was necessary for him to go around the standing wagon on the left side (R. 68).

At that time another wagon (No. 2) was some feet ahead of him and to his left and was moving in the same direction as plaintiff (R. 128, 68). That is the picture which confronted plaintiff, and those two wagons were the only ones which in any way affected plaintiff's movements or his accident.

There was one wagon (R. 131, 132), and possibly more, behind plaintiff, but they had no connection with his movements or his accident; and there were some wagons further up the platform as far as 60 feet (R. 254), which wagons had no influence whatsoever on what occurred. The closest of any wagon to plaintiff was the one 30 feet behind him (R. 71, 72, 133). According to the evidence and the way that plaintiff described his movements, the accident would have occurred in exactly the same way if there had been no wagons within sight except his and the two mentioned above.

Plaintiff's accident occurred when he turned to his left to fall in line with the moving wagon (R. 106), in order to pass to the left of the standing wagon. Plaintiff had made such a turn on many previous occasions without catching his wagon on an adjacent train (R. 108); and on this occasion he thought he was turning safely (R. 128), but he turned too sharply so that the rear of the wagon (pivoting on center wheels, R. 38) swung into the moving train to his right. The train then pushed the wagon, and plaintiff was pinned against the standing train to his left and was injured (R. 62, 63).

Plaintiff testified that if the moving wagon had been further along the platform, he "could have made that turn easy" (R. 125), and he also testified that he could have stopped his forward movement in a step or two (R. 102). The result of this is that had plaintiff hesitated a moment to let the moving wagon clear the way, plaintiff

would have "made that turn easy" (R. 125). The fact that plaintiff did not hesitate and the fact that he did make a sharper turn than necessary, considered either together or separately, seem to be the only causative factors in the case.

Our State Supreme Court found no negligence under these simple circumstances, and we believe that in this instance this Court will agree with that decision. The decision of the state court is reported at 312 S. W. 2d 769.

## II.

## ANSWER TO STATEMENTS IN PETITION.

There are certain statements and arguments made by plaintiff in his Petition to this Court, which statements must be corrected and which arguments must be answered in order that a clear understanding may be had of the case and its probative facts. For convenience, we will locate each by page number of the Petition.

### A.

**Page 8 of the Petition** (middle of last paragraph): It is stated that plaintiff saw three or four wagons moving "between him and the bull wagons" (R. 51). That statement is **not** borne out by page 51 of the Record. The evidence referred to was stricken by the Court, and even if not stricken it does not say that there were any wagons "between" plaintiff and the bull wagons, nor does plaintiff anywhere claim such to have been a fact. Instead, plaintiff testified at R. 53, 54, that except for the two moving flat wagons **opposite** the standing bull wagons, the wagons were all north of the bull wagons or south of plaintiff—**not** in between.

B.

**Page 9 of the Petition** (last paragraph): It is here stated, "There was evidence that there were as many as 7 flat wagons in the area between the north elevator and the standing bull wagons at the time of petitioner's (plaintiff's) injury (R. 137, 270, 299)." That statement is **not** borne out by the record pages listed, and it should also be noted that the distance referred to is 90 feet (R. 46, 47, 62—bull wagon at third post from elevator, and posts 30 feet apart), making considerable space for wagons to be located. In any event, plaintiff's testimony demonstrates that of all possible wagons found on the platform, only one was within his intended pathway (R. 109) which was the closest of the two moving flat wagons opposite the standing bull wagons, and the others had no bearing on his accident.

To demonstrate that the statement by plaintiff quoted above is **not** correct by the Record, it is necessary to analyze the testimony on each of the three pages cited:

(1) **R. 137**: Witness Harold Robinson guessed there were four flat wagons after being asked: "Q. Now, north of these two tractors or bull wagons, was there any other vehicle?" If they were **north** of the bull wagons, they were not between the north elevator and the bull wagons, because the north elevator was **south** of the bull wagons."

(2) **R. 270**: Witness Claudy Glasgow testified that there were 5 or 6 flat wagons in the area. However, the witness was testifying about a time considerably before plaintiff was even on the platform. This witness came up the elevator before plaintiff (R. 267) and that is what he saw when he arrived on the platform. After seeing this and before plaintiff's accident, Glasgow had walked from the elevator the ninety feet to bull wagons (R. 46, 47, 62) and 100 feet further (R. 279), a total of 190 feet, and all of that time those flat wagons were moving also (R. 138).

The locations of the flat wagons described by this witness were entirely different when plaintiff arrived and later when his accident occurred.

(3) **R. 299**: Witness Emerson Long describes the location of flat wagons at the time of his arrival on the platform, which was **after** the accident (R. 294). He testified that there were four to six wagons north of plaintiff, **but** he further stated that those wagons included the standing bull wagons and that the others mentioned were **north** of the standing wagons (R. 299); so **none** of the wagons described by this witness were "in the area between the north elevator and the standing bull wagons", as is claimed in plaintiff's Petition (pages 9 and 10).

Our reason for correcting this statement by plaintiff in the Petition is that throughout the Petition the inference is being made by its author that there was a congestion of many wagons in a small area and that because plaintiff was hemmed in he had no choice but to turn as he did, and an accident was inevitable. The facts of the Record do not bear out such an argument, and plaintiff himself in describing the cause made **no** claim that a congestion of many wagons caused his accident at all. We will demonstrate below just what plaintiff himself said happened, and it does not include any inference that any but the two mentioned wagons (No. 1 and No. 2) had anything to do with his accident.

C.

**Page 16 of the Petition,** middle paragraph, lists five conditions which allegedly caused plaintiff's accident. We will answer each separately:

(1) This Court has never indicated that it will hold that it is negligence to require men to work in an area where trains are moving. This Court knows that such a holding would be tantamount to saying that it is negligence to run

a railroad. There is no evidence of any overhang which could be sufficient to lend itself to a narrowing of the platform. And there is no evidence that the posts (which supported the roof) caused plaintiff any inconvenience in turning his wagon (R. 108), nor does the statement in the Petition favor us with any page references from the Record to bear out such statements.

(2) The wagon furnished to plaintiff was one which he could easily turn from one side of the platform to another without danger of contacting a train alongside the platform (R. 108, 109). The evidence does not indicate that the length of the wagon, as compared to the width of the platform, had anything whatsoever to do with the fact that plaintiff moved his wagon so that it was struck by the train.

(3) Calling the platform "overcrowded" is not justified by the evidence concerning wagons that are pertinent to the issues. Only two other wagons had any connection with plaintiff's movements—the nearest standing bull wagon and the moving flat wagon which plaintiff intended to follow. All other wagons were out of the picture entirely. Certainly there were other wagons on that platform, but the platform is 1800 feet long (R. 309) and can easily accommodate many such wagons. Undoubtedly, there were other wagons on other platforms in the station, and if they had been described in the evidence and counted, they could be added to the figures suggested by plaintiff in this Petition, but they would have no more to do with plaintiff's accident than did any other wagons on the platform involved, except the two wagons which were ahead of plaintiff. Under Point II, B, we have fully discussed the claim in this Petition that there were seven other wagons in the area, and we have shown that those wagons were not in the positions which the Petition assigns to them, nor were they in any sense involved in the accident.

(4) Requiring plaintiff to walk on a platform alongside a moving train is not negligence. This is the same as the allegation in subparagraph (1) above, and to require plaintiff to walk on such a platform is no different from the situation where people every day walk on sidewalks alongside of moving automobiles. We cannot believe that this will be counted as negligence.

(5) The statement that defendant failed to furnish plaintiff with a reasonably safe path begs the question. It can only add a number, but not strength, to the argument.

In the last paragraph on page 16 of the Petition, plaintiff gilds the lily when he says that "given the facts in this record, an injury was almost inevitable." An injury did occur because of what plaintiff did on the day in question, but the cause was not negligence of defendant in any sum whatsoever—it was plaintiff's failure to act prudently that caused his accident. His actions did produce an injury to himself; therefore, his actions made an accident inevitable, but certainly the situation which confronted plaintiff was a common, ordinary, every-day condition, and until plaintiff made his imprudent moves no accident was inevitable.

D.

**Page 19 of the Petition,** last paragraph, makes three separate attacks on the state court's opinion. We will answer each in order:

(1)-(a) The conclusion by the state court that the wagon ahead of plaintiff's did not interfere with plaintiff's operation of his wagon was not founded solely on the plat (Plaintiff's Exhibit No. 8, R. 44, 45) introduced in evidence by plaintiff but was a reiteration of the facts that plaintiff had outlined in his testimony, and the plat and cut-outs were a demonstration of what plaintiff stated in his testimony. Plaintiff testified that the wagon was approximately 30 feet ahead of him (R. 71, 72, 128) and that he intended

to follow it (R. 106). At the request of his own counsel, he positioned the scale cut-outs of the wagons on the scale plat as a visual demonstration of his oral testimony (R. 53), and the state court refers to the plat as a means of demonstrating what plaintiff said happened.

(1)-(b) The state court concluded that the platform was not "overcrowded" and the term was there used in the sense of being congested to a point where the presence of other wagons interfered with plaintiff's movement of his wagon. Plaintiff had demonstrated the positions of the various wagons involved by placing the cut-outs on the plat "in the position they were" (R. 53). The state court accepted plaintiff's version and properly held that it did not constitute "overcrowding." The author of the Petition states that this ignores the "evidence that there were as many as 7 flat wagons in the area" (R. 137, 270, 299), but the Petition does not say what area, the platform being 1800 feet long (R. 309), and we have already shown under Point II, B, above, that the Record pages 137, 270 and 299 do **not** show that there were seven flat wagons close by plaintiff.

(1)-(c) There was no evidence "that the crowding of the platform made it difficult, if not impossible, for petitioner (plaintiff) to turn his flat wagon and 'keep it in the clear'" (R. 125, 128, 171) (top of page 20 of Petition); therefore, the state court could not be said to have "disregarded" such evidence. Witness what each of those Record pages shows:

**R. 125**: A leading question by plaintiff's counsel used the word "difficult," but plaintiff's answer does not adopt the word, and the answer merely restates that at the moment of plaintiff's turn the moving wagon had not yet moved up quite enough for plaintiff to make an "easy" turn.

**R. 171**: Plaintiff's witness Robinson used the word "crowded," but obviously in the sense that there was a flat wagon up ahead of plaintiff and if plaintiff attempted to move right in with the other wagon it would then become crowded. He did not say that the condition "made it difficult" or "impossible" for plaintiff to move to the left and stay in the clear. In fact, the witness immediately afterwards testified that plaintiff "had a clear right of way to swing all the way over to the other side of the platform," and then said, "But up ahead he wasn't in the clear" (R. 173).

**R. 128**: Plaintiff's testimony on this page tells the whole story:

> "A. Well, I did think I was turning safely, which I tried, and if it hadn't been for this wagon in front of me I could have made it easy.
>
> Q. What wagon was that?
>
> A. This flat here in front.
>
> Q. If it hadn't been for that you could have made what easily?
>
> A. I could have made it in there and got my wagon in the clear easy.
>
> Q. You could have gotten in the clear easily?
>
> A. Yes, sir.
>
> Q. And that's what you were trying to do?
>
> A. Yes, sir, that is what I was trying to do" (R. 128).

Add to the above quote this testimony of plaintiff:

> "Q. But it is quite possible, isn't it, to turn one of those flat wagons from one side to the other without catching it onto a train?
>
> A. Yes, sir, I have lots of times.
>
> Q. And you did that back here, didn't you?
>
> A. Yes, sir.

Q. And you have done it lots of times, like you say?
A. Yes, sir" (R. 108).

* * * * * * * *

"Q. Now, just prior to the time you made this turn from the east side of the platform toward the west do you recall whether or not those flat wagons that were on the west side were moving or not?

A. I ain't for sure but I believe they were moving" (R. 68).

* * * * * * * *

"Q. Going at the speed you were going there, pulling that empty truck, within what distance could you have brought it to a stop?

A. Well, I could have stopped right away, no faster than I was going.

Q. Right away?

A. Yah.

Q. Right now, you indicate?

A. Not like the pop of your hand but you could stop in a step or so" (R. 102).

The above quotations are the crux of the whole situation—they are plaintiff's own statements of **all** causative factors. None of the other wagons which are mentioned in plaintiff's Petition for Writ of Certiorari are intimated as having one iota of a part in the scene except the standing wagon which plaintiff was going to pass. This brings us back to the beginning of our presentation in this brief—it is the whole case for plaintiff and for defendant. Again we say that if plaintiff had hesitated a moment to permit the moving wagon to go further ahead, or if he had not inadvertently turned as sharply as he did the accident would not have occurred. This is not **contributory** negligence, because there was no negligence chargeable to defendant.

We most respectfully submit that the Petition for Writ of Certiorari should be denied.

## III.

## LIMITATION OF ACTION TO BE TAKEN BY THIS COURT.

Finally, in the Prayer of the Petition, ending on page 24, plaintiff asks that the judgment be reversed with directions to affirm the judgment of the trial court. The tail end of that request ignores that there are many questions concerning error in the trial of the case, which questions were not decided by the State Supreme Court. If this Court grants certiorari and decides to reverse the present judgment, it should not direct more than that the cause be remanded with directions to proceed further in accordance with the decision of this Court, and the questions of error should then be decided by the state court. We honestly believe that this Court will not grant a reversal in this case.

Respectfully submitted,

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